

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2049

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
THOMAS LENTINI,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee
-----x

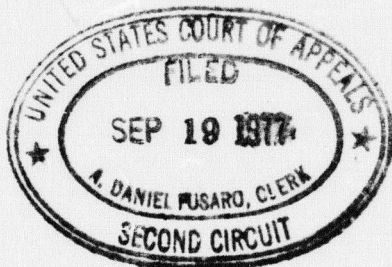
BRIEF OF THE APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK-D.C. CIVIL NO. 76 CIV 2117
HONORABLE K. T. DUFFY, UNITED STATES DISTRICT JUDGE

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* RECORDS ROOM *

APPEAL NO: 77-2049

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Submitted by:
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BRIEF OF THE APPELLANT

JURISDICTIONAL STATEMENT:

This is an appeal from a denial of a Motion to Vacate Sentence submitted to the United States District Court, for the Southern District of New York pursuant to Title 28 United States Code Section 2255, entered by the Honorable Kevin Thomas Duffy, Judge, on February 2, 1977 without an Evidentiary Hearing, and an application for re-argument denied on March 24, 1977 without a hearing.

STATEMENT OF THE CASE:

The Petitioner-Appellant, Thomas Lentini, hereinafter referred to as 'Appellant' or Lentini; was indicted in 73 Crim 1099 in the Southern District of New York charging various violations of the Controlled Substance Act, and on April 26, 1974 Appellant submitted a plea of guilty to two counts and was thereafter sentenced to a term of 15 years on each count

to run concurrently with each other with a 10-year special parole term to follow; with this sentence to run concurrently with a 11 year sentence and 10-year special parole term previously imposed by another Court. The instant sentence was imposed under the parole provisions of 18 U.S.C. 4208(a) (2), but the instant sentence was imposed under the parole provisions of 18 U.S.C. § 4202, making parole eligibility at one-third of the sentence.

In the case at bar the Appellant was advised by counsel to enter the plea of guilty, and in so doing he would be assured to have his sentence imposed concurrently with the previously imposed 11 year sentence. At no time was the Appellant advised that the term of imprisonment would exceed the 11-year term of his then existing sentence, nor was he informed that the A-2 provision of the existing sentence would be controverted by the imposition of a regular adult sentence; and he further was not advised that a special parole term would be imposed in addition to the term of imprisonment.

Counsel for the Appellant disclosed only at the proceedings conducted on January 8, 1974, that the extent of the agreement between the Government and the Appellant's counsel was that the Appellant would plead guilty to two Counts (1 and 23), and that at the time of sentencing the remaining counts would be dismissed. Count 1 charged a conspiracy to violate the Controlled Substance Act and Count 23 charged the distribution of three kilograms.

References to the Plea Proceedings will be hereafter designated as (TR-) and will refer to the Pleading Proceedings conducted before Hon. Kevin Duffy in 73 Crim 1099 on January 8, 1974.

STATEMENT OF THE ISSUE ON APPEAL:

The appellant alleged in his Motion to Vacate Sentence that Sentence Court did not comply with rule 11, Federal Rules of Criminal Procedure when it accepted the Plea of Guilty in that the Court failed to inform him of the total consequences of his plea of guilty, and this is supported by the Records and the Files of the Case, therefore, an Evidentiary Hearing was required to determine the validity of the Plea of Guilty. The Court not only failed to grant an Evidentiary Hearing but denied the motion without refuting the facts supported by the Records and Files of the Case.

ARGUMENT ON APPEAL:

THE DISTRICT COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING SINCE THE RECORDS AND FILES OF THE CASE SUPPORTED APPELLANT'S ALLEGATION THAT THE COURT FAILED TO COMPLY WITH RULE 11 FEDERAL RULES OF CRIMINAL PROCEDURE WHEN ACCEPTING APPELLANT'S PLEA OF GUILTY.

The statute, 28 U.S.C. § 2255, makes it mandatory upon the District Court to grant a hearing "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief, the court shall order the Government to show cause, grant a prompt hearing...." Therefore, if the records and the files of the case do not refute the allegations in the Motion to Vacate, the Statute requires that an Evidentiary Hearing be ordered. Personal reflections, interpretations and recollections, reduced to writing are not to be presumed a part of the trial records. Holliday v. United States, 380 F.2d 270.

The requirement that an Evidentiary Hearing be conducted has been the basis for countless decisions all stating: "(u)nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief..."--a hearing shall be conducted. Reagor v. United States, 488 F.2d 515 (5th Cir. 1973); Fuentes v. United States, 455 F.2d 910, 911; Machibroda v. United States, 362 U.S. 487, 82 S.Ct. 510; Hilliard v. Reta, 465 F.2d 829.

Since compliance with Rule 11, F.R.Cr.P. requires that a defendant enter a plea of guilty only after a determination that the defendant is entering it (1) knowingly (voluntarily); (2) that he understands the nature of the charges against him; (3) that he is informed of the consequences of the plea; (4) that there is a factual basis for the plea.

The Records attest to the fact that the Court did not inform the Appellant of the consequences of the plea; see (TR-5):

"THE COURT: Have you discussed with your counsel the range of penalties which could be imposed by this Court on a plea of guilt including what possible maximum sentence may be?

THE WITNESS: Yes, your Honor.

THE COURT: Mr. Phillips, it's my understanding that conspiracy counts--let's put it the other way around and make you work.

What is the maximum sentence on the conspiracy count?

MR. PHILLIPS: The maximum sentence on both conspiracy and substantive counts would be fifteen years except Mr. Lentini is a second offender so theoretically could receive a sentence of up to thirty years..."

No further references were made as to the consequences of the plea that could be imposed until during the Sentencing proceedings held on April 26, 1974 at

10:15 a.m. where at the government corrected the erroneous statement at the plea proceedings stating that the Appellant could be sentenced as a Second Offender, when in fact this was untrue as the Government had neglected to file a Second Offender Information. See Page 1 and 2 of the Minutes of the Sentencing Proceedings:

"THE COURT: Mr. Curran, was a second offender information filed in this case?

MR. CURRAN: As far as I can tell, your Honor, one was not, nor was one filed last July when this defendant pleaded guilty in that case, as far as I could tell.

I have checked with the assistants involved, and I cannot report to the court that the Government couldn't have, with the exercise of due diligence, to use the statutory language, discovered the facts and I have no explanation. As far as I could tell--it is inexcusable, but it wasn't filed.

THE COURT: If it wasn't filed, it wasn't filed.

MR. CURRAN: Well, I wanted to make that statement.

THE COURT: Do you have anything to say, Mr. Curran?

MR. CURRAN: Briefly, your Honor, yes. This defendant Thomas Lentini has pleaded guilty to counts 1 and 23, and under the existing situation I believe that he faces a maximum penalty of 15 years in jail and a \$25,000 fine and a 10-year special parole term on each of of these counts....."

Clearly, it cannot be stated that the Petitioner was properly informed of the consequences of his plea when the sentence imposed was 15 years with a 10-year special parole term to follow.

The waiver of rights that occurs when a plea of guilty is entered must be a knowledgeable waiver, as a plea of guilty is more than an admission of conduct; it is a conviction. Rule 11, governs the duty of a Federal Trial Judge before accepting a guilty plea. See McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed. 2d 418; Kercheval v. United States, 227 U.S. 220 (a guilty plea is a conviction, it's validity must be as firmly grounded as any other type of conviction); Machibroda v. United States, 368 U.S. 487 (ordered a hearing since the records themselves did not support the finding that the plea was not voluntary); United States v. Young, 424 F.2d 1276 (the DEFENDANT MISUNDERSTOOD THE LEGAL REQUISITES NECESSARY TO MAKE HIM LIABLE AS A PARTICIPANT IN THE OFFENSE); in United States v. McGee, 355 U.S. 17 (the plea may be a voluntary act of the defendant, yet not made with understanding and thus be subject to vacation), United States v. Antoine, 434 F.2d 450 (2nd Cir. 1970). It is not necessary to show that prejudice inheres in a violation of Rule 11. In all the Federal Courts this has been the accepted view; United States v. Brown, 428 F.2d 1100; United States v. Berlin, 437 F.2d 901; United States v. Hopkins, 431 F.2d 429, 430.

SUMMARY:

FOR ALL OF THE ABOVE REASONS THE APPELLANT PRAYS THAT
THE COURT REVERSE THE DECISION OF THE COURT BELOW AND
REMAND FOR AN EVIDENTIARY HEARING ON THE FACTS IN THE
INSTANT CASE.

Respectfully submitted,

Thomas Lentini
Thomas Lentini, Pro Se

*Seen to and subscribed
before me this*

July 14, 1977.

C. H. [Signature]
Notary Officer

Notary Officer: Authorized by the Act of
July 7, 1955 to administer oaths and
40041.

PROOF OF SERVICE

I, hereby certify, that I am the Appellant in the foregoing Brief of the Appellant, and that I have served a copy of said brief on the United States Attorney for the Southern District of New York, One Saint Andrews Plaza, New York, New York 10007, by mailing same by CERTIFIED MAIL RETURN RECEIPT REQUESTED, on this the 14 day of July, 1977.

STATE OF GEORGIA)

100

COUNTY OF FULTON)

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 14 DAY OF JULY, 1977.

CHP
PAROLE OFFICER

Parole Officer authorized by the act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

Thomas Lentini
Thomas Lentini, Appellant